

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

VICTORIA L. MCCUTCHEN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 14-cv-05425 RJB JRC

REPORT AND RECOMMENDATION  
ON PLAINTIFF'S COMPLAINT

Noting Date: May 15, 2015

This matter has been referred to United States Magistrate Judge J. Richard  
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,  
271-72 (1976). This matter has been fully briefed (*see* Dkt. 14, 21, 22).

After considering and reviewing the record, the Court concludes that although  
both parties admit that the ALJ erred in evaluating the medical evidence in the record, an  
immediate award of benefits would not be warranted. Further administrative proceedings

1 are necessary because there are outstanding issues to be resolved regarding the medical  
2 evidence, and thus in assessing plaintiff's RFC.

3 Therefore, this matter should be reversed and remanded pursuant to sentence four  
4 of 42 U.S.C. § 405(g) to the Acting Commissioner for further proceedings consistent with  
5 this Report and Recommendation.

### 6 BACKGROUND

7 Plaintiff, VICTORIA L. McCUTCHEN, was born in 1988 and was 14 years old  
8 on the alleged date of disability onset of April 5, 2003 (*see* AR. 181-86, 187-90, 191-92).  
9 Plaintiff has completed some community college courses but did not complete high  
10 school, nor has she obtained her GED (AR. 37-38). Plaintiff has no past relevant work  
11 history (AR. 19, 258).  
12

13 According to the ALJ, plaintiff has at least the severe impairments of "bipolar  
14 disorder, post-traumatic stress disorder, and personality disorder (20 CFR 404.1520(c)  
15 and 416.920(c))" (AR. 13).

16 At the time of the hearing, plaintiff was living in her motor home (AR. 34, 35).

### 17 PROCEDURAL HISTORY

18 Plaintiff's applications for child's disability insurance ("DIB") benefits pursuant to  
19 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to  
20 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and  
21 following reconsideration (*see* AR. 66-75, 76-85, 88-99, 100-111). Plaintiff's requested  
22 hearing was held before Administrative Law Judge Gordon W. Griggs ("the ALJ") on  
23 December 11, 2012 (*see* AR. 26-62). On December 26, 2012, the ALJ issued a written  
24

1 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social  
2 Security Act (*see* AR. 8-25).

3 On March 24, 2014, the Appeals Council denied plaintiff's request for review,  
4 making the written decision by the ALJ the final agency decision subject to judicial  
5 review (AR. 1-6). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court  
6 seeking judicial review of the ALJ's written decision on May 22, 2014 (*see* Dkt. 1).  
7 Defendant filed the sealed administrative record regarding this matter ("AR.") on  
8 November 10, 2014 (*see* Dkt. 8, 9).  
9

10 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or  
11 not the ALJ properly assessed plaintiff's residual functional capacity ("RFC"); and (2)  
12 Whether or not the ALJ provided a sufficient basis for questioning the credibility of  
13 plaintiff (*see* Dkt. 14, p. 2). Defendant concedes that the ALJ erred in evaluating the  
14 medical evidence, and thus in assessing the plaintiff's RFC, and that the matter should be  
15 remanded, but disagrees with plaintiff's requested remedy of reversal for payment of  
16 benefits (*see* Dkt. 21, p. 1, 2).

#### 17 STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
19 denial of social security benefits if the ALJ's findings are based on legal error or not  
20 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
21 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
22 1999)).  
23  
24

DISCUSSION

**Whether the case should be remanded for further administrative proceedings or reversed for payment of benefits.**

The parties agree that the ALJ erred in his evaluation of the medical source opinions in the record. However, the parties disagree as to whether this matter should be reversed and remanded for further proceedings or for an award of benefits. Plaintiff contends that further development of the record is unnecessary and therefore that the plaintiff should be found disabled and this matter should be remanded with a direction to award benefits (*see* Dkt. 22, pp. 3-4). Defendant contends that further development of the record is necessary because the medical opinions were divided regarding the severity of plaintiff's mental impairments (*see* Dkt. 21, p. 4).

Generally, when the Social Security Administration does not determine a claimant's application properly, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put forth a "test for determining when [improperly rejected] evidence should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

1 At the first step, the court should determine if “the ALJ has failed to provide  
2 legally sufficient reasons for rejecting [the particular] evidence.” *Smolen, supra*, 80 F.3d  
3 at 1292 (citations omitted). Next, as stated recently by the Ninth Circuit:

4 Second, we turn to the question whether [or not] further administrative  
5 proceedings would be useful. In evaluating this issue, we consider [if] the  
6 record as a whole is free from conflicts, ambiguities, or gaps, [if] all factual  
7 issues have been resolved, and [if] the claimant’s entitlement to benefits is  
8 clear under the applicable legal rules.

9 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)  
10 (citations omitted).

11 The final step, then, is to determine whether or not “if the improperly  
12 discredited evidence [was] credited as true, the ALJ would be required to find the  
13 claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir.  
14 2014) (*citing Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1202 (9th Cir. 2008);  
15 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d  
16 625, 640 (9th Cir. 2007); *Benecke, supra*, 379 F.3d at 595; *Smolen, supra*, 80 F.3d  
17 at 1292). The court noted that at this final “stage of the credit-as-true analysis, we  
18 do not consider arguments against crediting evidence that the ALJ did not make.”  
19 *Id.* at 1022 n.29.

20 The court in *Garrison* found that “the district court abused its discretion by  
21 remanding for further proceedings where the credit-as-true rule is satisfied and the record  
22 afforded no reason to believe that [the claimant] is not, in fact, disabled.” *Id.* at 1021  
23 (footnote omitted). The court noted that simply providing an ALJ with another  
24 opportunity to reject evidence is not proper, and concluded as follows:

1 Although the Commissioner argues that further proceedings would serve  
2 the “useful purpose” of allowing the ALJ to revisit the medical opinions  
3 and testimony that she rejected for legally insufficient reasons, our  
4 precedent and the objectives of the credit-as-true rule foreclose the  
5 argument that a remand for the purpose of allowing the ALJ to have a  
6 mulligan qualifies as a remand for a “useful purpose” under the [second]  
7 part of the credit-as-true analysis. (Citations to *Benecke*, 379 F.3d at 595  
8 (“Allowing the Commissioner to decide the issue again would create an  
9 unfair ‘heads we win; tails, let’s play again’ system of disability benefits  
10 adjudication.”); *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004)  
11 (“The Commissioner, having lost this appeal, should not have another  
12 opportunity to show that Moisa is not credible any more than Moisa, had he  
13 lost, should have an opportunity for remand and further proceedings to  
14 establish his credibility.” (citation omitted))).

15 *Id.* at 1021-22.

16 However, the Court also notes that in another recent case, the Ninth Circuit  
17 pointed out that the issue of whether or not further administrative proceedings would  
18 serve a useful purpose comes before the court decides and applies the final part of the  
19 credit-as-true rule. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105  
20 (9th Cir. 2014) (citations omitted).

21 In *Treichler*, the court first determined that the ALJ had provided only a “‘vague  
22 allegation’ that [the] claimant’s testimony [was] ‘not consistent with the objective  
23 medical evidence,’ without any ‘specific findings in support,’” which was “insufficient  
24 for [the court’s] review.” *Id.* at 1103 (citation omitted). The court continued with its  
25 review of the record and, after noting inconsistencies between the claimant’s statements  
26 and the record, concluded that because of conflicts and ambiguities in the record, and  
27 because not all essential factual issues were resolved, further factual development was  
28 necessary to resolve the issue of credibility. *Id.* at 1103-06. As noted by the court, “an

1 ALJ's failure to provide sufficiently specific reasons for rejecting the testimony of a  
2 claimant or other witness does not, without more, require the reviewing court to credit the  
3 claimant's testimony as true." *Id.* at 1106.

4 Here, the parties agree that the first step is met, as defendant concedes that the  
5 ALJ erred by failing to provide sufficient reasons to either adopt or discredit all of the  
6 medical source opinions (*see* Dkt. 21, p. 2).

7 However, the second step is not met because the record as a whole is not free from  
8 conflicts and claimant's entitlement to benefits is not clear under the applicable legal  
9 rules. *See Treichler, supra*, 775 F.3d at 1103-04. Here, although the ALJ failed to provide  
10 legitimate reasons supported by evidence to either adopt or discredit all of the medical  
11 source opinions, some of which support a finding of disability, the ALJ noted several  
12 opinions that do not support a finding of disability.

13 For example, the ALJ gave great weight to the opinion of treating physician Dr.  
14 Donna Silowowski, D.O. (AR. 18). Dr. Silowowski opined that plaintiff was capable of  
15 maintaining regular job attendance, getting along with supervisors and co-workers, and  
16 performing simple, routine tasks (*see* AR. 335-36). Plaintiff does not challenge the  
17 weight given to this opinion. Moreover, the ALJ gave great weight to three state agency  
18 psychological consultants whose opined limitations were consistent with the ALJ's RFC,  
19 as he found their opinions to be consistent with the record as a whole (*see* AR 18, 66-75,  
20 88-99, 365-78). These opinions are in direct conflict with the opinions the ALJ failed to  
21 credit. The ALJ is responsible for determining credibility and resolving ambiguities and  
22 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)  
23  
24

1 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). Therefore, the Court  
2 concludes that outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292.

3 Plaintiff cites to *Garrison*, arguing that allowing further proceedings for an ALJ to  
4 revisit medical opinions he improperly rejected is not a legitimate “useful purpose” (*see*  
5 Dkt. 22, p. 3). However, the Court is not ordering further proceedings for the ALJ to  
6 revisit the opinions he improperly failed to credit, but rather to resolve the conflict  
7 between those opinions and the opinions he did credit, which leave plaintiff’s entitlement  
8 to benefits unclear. The Court cannot say that all factual issues have been resolved and  
9 that plaintiff is clearly entitled to benefits, so the credit-as-true argument fails at step two.  
10 *See Treichler, supra*, 775 F.3d at 1103-04.  
11

12 Furthermore, even should additional limitations be assessed, another outstanding  
13 issue is whether or not a vocational expert may still find an ability to perform other jobs  
14 existing in significant numbers in the national economy.

15 Therefore, for the reasons stated and based on the record as a whole, the Court  
16 concludes that this matter must be remanded for further administrative consideration.

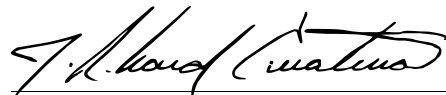
### 17 CONCLUSION

18 Based on these reasons, and the relevant record, the undersigned recommends that  
19 this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §  
20 405(g) to the Acting Commissioner for further proceedings consistent with this Report  
21 and Recommendation. **JUDGMENT** should be for plaintiff, and the case should be  
22 closed.  
23  
24



1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
3 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes  
4 of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating  
5 the time limit imposed by Rule 72(b), the clerk is directed to set the matter for  
6 consideration on May 15, 2015, as noted in the caption.

7 Dated this 23<sup>rd</sup> day of April, 2015.

8  
9 

10 J. Richard Creatura  
11 United States Magistrate Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24